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Supreme Court of the United States

OCTOBER TERM, 1961

NO. 845

OUACHITA PARISH SCHOOL BOARD,
Petitioner,

versus

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

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HAUBER PRINTING CO., INC., NEW ORLEANS

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Ouachita Parish School Board, a body politic and corporate under the law of Louisiana, governing body of the public school system of the Parish of Ouachita, State of Louisiana, applying for a writ of certiorari to the Supreme Court of Louisiana, to review that Court's judgment of December 29, 1961 (R-17; Appendix 1), rehearing refused February 2, 1962 (R-1), respectfully represents:

I.

OPINIONS IN THE COURTS BELOW

The opinion of the Louisiana Supreme Court was rendered December 29, 1961 (R-17; Appendix 1); and is reported in La. ., So. (2d) (1962).* Appli-

* Unreported when this goes to print.

cation for rehearing was timely filed, January 11, 1962 (R-2); and was refused by the Louisiana Supreme Court (by minute entry only, and without opinion) on February 2, 1962 (R-1).

No opinion was rendered by the Court of Appeal for the Second Circuit (Louisiana intermediate court of appeal), to which the case went on supervisory writs to the Fourth Judicial District Court (Louisiana court of first instance); the Court of Appeal having certified the case to the Louisiana Supreme Court (R-162).

The opinion of the District Court (R-100) has no relevance. The issue of Constitutional import tendered by this petition is that of judicial interposition by the Louisiana Supreme Court in its refusal to abide by this Court's affirmance of the Federal unconstitutionality of a Louisiana State statute. This issue originated in the opinion of the Louisiana Supreme Court, which (with petitioner's application for rehearing in that court) constitutes the only part of the record needful to consideration of this petition. Absent any printed record in the Louisiana courts, one copy of the typescript record, certified by the Clerk of the Louisiana Supreme Court, is filed.

The opinion of the Louisiana Supreme Court in the case of *Terrebonne Parish School Board v. St. Mary Parish School Board, et al.*, reported in La. , So. (2) (1962),* is incorporated by certified copy in the record (R-168); and follows this petition as Appendix 2. This opinion is necessary under Rule 23 (1) (i) to ascertain the grounds of the judgment in the case at bar (by reference thereto in the opinion of the Louisiana Supreme Court in the case at bar; R-13). Date of decision, and date of refusal of a rehearing in the *Terrebonne Case* were coincident with those dates in the case

* Unreported when this goes to print.

at bar. A petition to this Court by St. Mary Parish School Board for writ of certiorari in the *Terrebonne Case* is anticipated.

The record is also supplemented by the memorandum Per Curiam of the Louisiana Supreme Court, November 29, 1961, in the case of *LeLong v. Sutherland, et al* (R-178), refusing writ of certiorari to the Louisiana Court of Appeal for the Fourth Circuit, as a pertinent decision of the Louisiana Supreme Court thirty days earlier in direct conflict with that court's decision in the case at bar. In the *LeLong Case* the Louisiana Supreme Court recognized, as it should, the supremacy of this Court's adjudication of the Federal unconstitutionality of a companion Louisiana State statute in one of the *Bush Cases* (*Bush v. Orleans Parish School Board*, 191 F.S. 871; 367 U.S. 908, 6 L. Ed. (2) 1250-1961), contrary to that court's violation of the Supremacy Clause of the United States Constitution (Article VI, Clause 2), in its refusal to abide in the case at bar this Court's affirmance of the Federal unconstitutionality of another Louisiana segregation statute in an earlier *Bush Case* (*Bush v. Orleans Parish School Board*, 188 F.S. 916; 365 U.S. 569; 5 L. Ed. (2) 806; 6 L. Ed. (2) 239—1961). The Per Curiam of the Louisiana Supreme Court in the *LeLong Case* is unreported; but follows this petition as Appendix 3. The reported decision of the Louisiana Court of Appeal for the Fourth Circuit in the *LeLong Case*, 134 So. (2) 627, (1961), is not pertinent.

II.

JURISDICTIONAL STATEMENT

Jurisdiction is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 929 (Section 1257 (3), Title 28 of the United States Code):

"Final judgments or decrees rendered by the high-

> est court of a State in which a decision could be had, may be reviewed by the Supreme Court * * * (3) By writ of certiorari * * * where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States."

The Constitutional right claimed, and the Constitutional provision involved, is that of the Supremacy Clause, Article VI, Clause 2, of the United States Constitution:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

This petition is timely filed within the ninety day period prescribed in the Act of June 25, 1948, c. 646, 62 Stat. 961; as amended by the Act of May 24, 1949, c. 139, Sec. 106, 63 Stat. 104 (Title 28, Section 2101 (c) of the United States Code); the judgment of the Supreme Court of Louisiana having been rendered December 29, 1961 (R-17); application for rehearing having been filed January 11, 1962 (R-2); and rehearing having been refused February 2, 1962 (R-1).

> "Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree * * *." *28 U.S.C. Sec. 2101 (c).*

Gypsy Oil Company v. Escoe, 275 U.S. 498, 72 Law Ed. 393 (1927).

Department of Banking v. Pink, 317 U.S. 264, 87 Law Ed. 254 (1943).

III.

QUESTION PRESENTED FOR REVIEW

In view of the Supremacy Clause of the United States Constitution (Article VI, Clause 2), has the Supreme Court of Louisiana constitutional, judicial authority to apply, as in full force and effect, a statute of the State of Louisiana, which has been held unconstitutional as violative of the United States Constitution by a three-judge Federal Court, whose decision of unconstitutionality has been affirmed by the United States Supreme Court? *

This is the sole question presented. **The Louisiana Supreme Court rested its decision entirely on Act 25 of the First Extraordinary Session of the Louisiana Legislature of 1960, which had been declared unconstitutional by a three-judge Federal Court in** *Bush v. Orleans Parish School Board*, 188 F.S. 916; affirmed by the United States Supreme Court, without opinion; 365 U.S. 569; 5 L. Ed. (2) 806, 6 L. Ed. (2) 239 (1961). The Louisiana Supreme Court held that it was not bound to accept that adjudication of unconstitutionality because Federal Court decision was **motivated** by considerations of racial segregation. Petitioner submits that such refusal of the Louisiana Supreme Court to abide this Court's judgment of unconstitutionality of a State statute under the United States Constitution is manifest judicial interposition, inhibited by the Supremacy Clause of the United States Constitution.

* Heavy type emphasis in petition and appendices is that of Counsel.

IV.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This Federal question of major Constitutional import arises under the Supremacy Clause, Article VI, Clause 2, of the United States Constitution, quoted above verbatim.

The text of Louisiana Constitutional and statutory provisions is in no way essential to decision, because the question does not depend on the nature of the substance of such State law. Once adjudged unconstitutional by this Court, the State statute became extinct as a nullity; and could not be, and should not have been "revived" by the State Supreme Court. For reference, however, the pertinent provisions of Article 19, Section 26 of the Louisiana Constitution, and Act 25 of the First Extraordinary Session of the Louisiana Legislature of 1960, as they may be relevant to argument, are appended as Appendix 4 and Appendix 5, respectively.

V.

STATEMENT OF THE CASE

The State of Louisiana, through the Department of Highways, sued the Ouachita Parish School Board for expropriation of school property for highway purposes. The School Board asserted under Article 19, Section 26 of the Louisiana Constitution its immunity from suit in the absence of legislative sanction permitting suit.

The Louisiana Supreme Court held, pursuant to its opinion in the *Terrebonne Case*, that: " * * * Article 19, Section 26 could not be more clear and explicit in its command that the Legislature must first be applied to and permission be granted before a suit may be enter-

tained against a parish school board." (R-170; opinion in *Terrebonne*, Appendix 2).

The Louisiana Supreme Court further held, however, that such legislative permission, waiving the School Board's **State immunity** from suit, had been conferred by Act 25 of the First Extraordinary Session of 1960. The Court recognized that the United States Supreme Court had affirmed the decision of the three-judge Federal District Court in the *Bush Case*, *supra*, adjudging that statute wholly unconstitutional as in violation of the United States Constitution; but the Louisiana Supreme Court held that it was privileged to ignore that judgment of this Court, **because it was motivated by considerations of racial segregation.** That is all there is to this case on this petition. Was the Louisiana Supreme Court warranted in ignoring the final judgment of this Court on an issue of Federal unconstitutionality?

The relationship of the *Terrebonne Case* should be explained. It arose independently from another judicial district and another appellate judicial circuit of Louisiana. The two cases stand in no relation other than that the same State constitutional immunity, under Article 19, Section 26, of the St. Mary Parish School Board was asserted in the *Terrebonne Case*. By coincidence only both cases reached the Louisiana Supreme Court at the same time; and were argued, submitted and decided on coincident dates. The judicial assertion of legislative waiver of school board immunity to suit by alleged grant of permission in Act 25 was "rationalized" in the opinion in the *Terrebonne Case*, which was thereupon adopted by the Court in the case at bar.

This Federal question of the applicable force of the Supremacy Clause (Article VI, Clause 2) of the United States Constitution was necessarily never an issue in the

case until injected into it by the Louisiana Supreme Court's violation of the Supremacy Clause. **Petitioner here immediately, in its application for rehearing in the Louisiana Supreme Court, pled Article VI, Clause 2 of the United States Constitution (R-7); and there asserted its Federal Constitutional right and claim in these terms** (Petitioner's application for rehearing in the Louisiana Supreme Court; paragraph 7; R-6, 7):

> "In summary, the Court has erred because in refusing to abide by the United States Supreme Court's affirmation of the unconstitutionality of Act 25 under the United States Constitution (in the *Bush Case*) this Court has itself practised interposition; and has violated the cardinal principle of American Constitutional Law that the judgment of the United States Supreme Court adjudging a State statute to be unconstitutional under the Federal Constitution is the supreme law of the land, commanding adherence and compliance by the State Supreme Court, however much in disagreement it may find its own convictions. This is basic to our Federalism and Republican form of Constitutional government; and in brief this Court has been able to reach its present conclusion only by this plain circumvention of fundamental Constitutional law. *United States Constitution, Article VI, Clause 2.*"

The Louisiana Supreme Court, though acknowledging its own judicial discovery of its chosen ratio decidendi without benefit of counsel, refused a rehearing. Thus, petitioner, raising its claim of Federal Constitutional right at the instant of its inception, has yet never had its hour in court to be heard on the issue. It is noted that the Supreme Court of Louisiana elected as the basis of its decision an adjudged unconstitutional statute, which neither two State Courts of Appeal, nor two State

District Courts, nor counsel for the Department of Highways of the State of Louisiana, and three Parish School Boards of the State of Louisiana had had the temerity to assert.

VI.
ARGUMENT FOR ALLOWANCE OF THE WRIT

The petition presents a single question of paramount Constitutional import in the sensitive and vital area of intergovernmental relations, Federal and State. The question has nothing to do with segregation (at issue in the *Bush Case*, wherein Act 25 was adjudged unconstitutional); and nothing to do with condemnation under eminent domain of school property for highway purposes (on the substantive merits of the case at bar). The question tendered by this petition has nothing to do with the issue of State constitutional immunity from suit asserted by the School Board; nor does it concern the nature of the substantive provisions, or severability, of Act 25 of the First Extraordinary Session of the Louisiana Legislature of 1960.

The question is simply whether the decision of the Supreme Court of the United States, affirming the unconstitutionality of a State statute under the United States Constitution, is the Supreme Law of the Land; and whether a State Supreme Court is bound by that nullification of the statute under the Supremacy Clause, Article VI, Clause 2, of the United States Constitution. The Louisiana Supreme Court has held that it may inquire into what it conceives to have been the motivation of the Federal Court in nullifying the statute; and that it may look through and go behind the judgment of this Court on the basis of alleged considerations of judicial motivation, and ignore this Court's pronouncement of un-

constitutionality, revitalizing the statute for such purposes as it sees fit.

The issue is concise; and the error of the Louisiana Supreme Court is manifest. The thrust of the question goes to the heart of the Constitutional government of the United States. Either this Court or the Louisiana Supreme Court is the paramount judicial authority on the question of the Constitutionality of a Louisiana statute against attack under the United States Constitution. Both courts cannot be supreme; and if a State court can thus frustrate this Court's authority on issues of Federal Constitutionality, only anarchy in our Federal system of government can follow.

The three-judge Federal District Court, in *Bush v. Orleans Parish School Board* (188 F.S. 916) flatly held: "For the foregoing reasons, this court denies the interposition claim of the State of Louisiana and declares Acts 25 of the First Extraordinary Session of 1960 unconstitutional." This Court **affirmed.**

The Supreme Court of Louisiana, in the case at bar, has flatly held that:

> "As far as parish school boards are concerned, this section of the Louisiana Constitution (Article 19, Section 26) is no longer a bar to suit. **This is because** * * * the Legislature of this state passed Act 25 of the First Extraordinary Session of 1960, R.S. 17:51; which in Section 1 provides that parish school boards can sue and be sued, thus waiving their immunity from suit." (R-19; Appendix 1).

This was in fact the **second time** the Supreme Court of Louisiana had interposed its authority to apply Act 25 as Constitutional despite its nullification in the *Bush Case;* having done the same thing without challenge in *Singlemann v. Davis*, 240 La. 929, 125 So. (2) 414 (1960).

Were it possible to analyze judicial motivation, one might well wonder as to the motivation of the Louisiana Supreme Court in thus insisting there, and here, on the Constitutional validity of Act 25; since, tersely put, the Louisiana Supreme Court knew better.

> " • • • we are duty bound to arrive at the same decision as announced by the United States Supreme Court in its findings in the first *Pierre Case, supra*. There, we find both precedent and authority. We have no doubt that the jury selected in the instant case gave to the accused a fair trial and that the State officials were in good faith and well intending, but our United States Supreme Court is a judicial planet whose orbit draws into its vortex the findings of all state courts involving all Federal Constitutional questions which must be obeyed in order to maintain the law in its majesty of final decision." *State v. Nichols*, 216 La. 622, 44 So. (2) 318 (1950).

More recently, just thirty days prior to the judicial interposition of its authority over that of this Court in the case at bar in the matter of Federal unconstitutionality of a state statute, the same Louisiana Supreme Court had categorically acknowledged the force of the Supremacy Clause in its Per Curiam in *LeLong v. Sutherland* (Unreported; Appendix 3; R-178):

> "Pretermitting the question of the right of this plaintiff to institute and prosecute the instant action, it appears that we are powerless to grant any portion of the relief demanded by him inasmuch as the Louisiana statute on which the entire demand is based • • • has been declared unconstitutional by the United States Supreme Court on the sole ground that assertedly the Legislature was prompted by a discriminatory motive in enacting it • • • ."
>
> "While we entertain serious doubt as to the sound-

ness of that ruling, particularly in view of the uniform jurisprudence of the federal courts (established over a period of many years prior to the consideration of the *Bush Case*) to the effect that such tribunals may not and do not inquire into the motives or wisdom of a legislative body acting within its proper power, **the fact remains that the specific statute involved here has been stricken with nullity and rendered permanently ineffective by the highest court of the land. It, in other words, is now non-existent, whether made so rightly or wrongly; and no judicial action can recreate it."**

How the same State court could have presumed to "recreate" Act 25 in the case at bar, in identical circumstances, one month later, is beyond petitioner's ken. The judicial act itself is fraught with the gravest danger to the very existence of our Constitutional Federalism. Should this sort of judicial interposition be allowed to stand in the face of challenge, its potential extension would be unlimited. Petitioner here presents for review an issue of basic intergovernmental relationship, on which one would have thought Constitutional fundamentals to have been unalterably established for more than a century. Petitioner apologizes for elucidating the obvious and the elementary in the following references to authority:

Cook v. Moffat, 5 How. 159, 12 Law Ed. 293 (1847):

> "When this Court has declared state legislation to be in conflict with the Constitution of the United States, and therefore void, the State tribunals are bound to conform to such decision."

Public Service Commission of Utah v. Wycoff Co., 344 U.S. 237, 97 L. Ed. 291, 73 S. Ct. 236 (1952):

> "State courts are bound equally with the Federal

Courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a Federal right."

Kalb v. Feuerstein, 308 U.S. 433, 84 L. Ed. 370 (1940):

"The States cannot, in the exercise of control over local laws and practice, vest State Courts with power to violate the supreme law of the land."

Cooper v. Aaron, 358 U.S. 1, 3 L. Ed. (2) 5, 78 S. Ct. 1401 (1958):

"This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system."

"No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."

Bush v. Orleans School Board, 188 F.S. 916 (1960), affirmed 6 L. Ed. (2) 239:

"And so, from the beginning, it was decided that the Supreme Court of the United States must be the final arbiter on questions of constitutionality. It is, of course, the guardian of the Constitution against encroachments by the national Congress. * * * But more important to our discussion is the constitutional role of the Court with regard to state acts. The original Judiciary Act of 1789 confirmed the authority of the Supreme Court to review the judgment of all state tribunals on constitutional questions. * * * Likewise from the first one of its functions was to pass on the constitu-

tionality of state laws. * * * And the duty of the Court with regard to the acts of the state executive is no different. * * * The fact is that the Constitution itself established the Supreme Court of the United States as the final tribunal for constitutional adjudication. By definition, there can be no appeal from its decisions."

"From the fact that the Supreme Court of the United States rather than any state authority is the ultimate judge of constitutionality, another consequence of equal importance results. It is that the jurisdiction of the **lower** federal courts and the correctness of their decisions on constitutional questions cannot be reviewed by the state governments. Indeed, since the appeal from their rulings lies to the Supreme Court of the United States, as the only authoritative constitutional tribunal, neither the executive, nor the legislative, nor even the courts of the state, have any competence in the matter. It necessarily follows that, pending review by the Supreme Court, the decisions of the subordinate federal courts on constitutional questions have the authority of the supreme law of the land, and must be obeyed. Assuredly, this is a great power, but a necessary one."

American Jurisprudence, Vol. 11—"Constitutional Law"—Section 104, page 741:

"It is a fundamental principle of the constitutional system of government of the United States that the decisions of the Federal Supreme Court are final and authoritative declarations as to the proper and correct construction to be placed on the Constitution and laws of the United States, and as to whether a state law contravenes any provisions of the Federal Constitution. On this principle, the construction given by that court to the Constitution and laws of the United States is received by all as the true construction. Whenever the Supreme Court of the United States declares

> that state legislation is in conflict with the Federal Constitution, the judicial tribunals of such state are bound to accept and conform to such decision.
>
> "If necessary, state tribunals will overrule or modify their prior decisions in order to conform with the announcements of the Supreme Court of the United States in reference to constitutional questions. * * * "

See, also: *Corpus Juris Secundum*, Vol. 16—"Constitutional Law"—Section 92, p. 301.

Shelley v. Kraemer, 334 U.S. 1, 92 L. Ed. 1161 (1948):

> "The short of the matter is that from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference, includes action of state courts and state judicial officials."
>
> "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendment, it is the obligation of this Court to enforce the Constitutional commands."

If the error of this judicial act be left uncorrected, Louisiana will stand alone in successful challenge of this Court's supremacy in the determination of the unconstitutionality of a State statute attacked as violative of the United States Constitution. The Louisiana Supreme Court, by denial of writ of certiorari in this case, would be recognized as vested with judicial authority to frustrate the Constitutional pronouncements of this Court.

VII.

PRAYER

Petitioner prays, therefore, that this Court's writ of certiorari issue to the Supreme Court of Louisiana to review its judgment of December 29, 1961; and that, upon due proceedings had, that judgment be reversed, and respondent's suit be dismissed; for costs; and for full and general relief.

Respectfully submitted,

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Monroe, Louisiana,
Counsel for Petitioner,
Ouachita Parish School
Board.

CERTIFICATE OF SERVICE

I certify that the respondent, the State of Louisiana, through the Department of Highways, has been properly served, in conformity with Rule 33 of the United States Supreme Court, with a copy of the foregoing petition for writ of certiorari, by depositing same in a United States postoffice, correctly addressed to respondent's counsel of record at his postoffice address, with first class, airmail postage prepaid; and that I execute this certificate as a member of the bar of the United States Supreme Court.

Monroe, Louisiana, this April 21, 1962.

GEORGE M. SNELLINGS, JR.

APPENDIX 1.

Friday, Dec. 29 1961

SUPREME COURT OF LOUISIANA

No. 45,845

STATE OF LOUISIANA THROUGH THE DEPARTMENT OF HIGHWAYS

versus

OUACHITA PARISH SCHOOL BOARD

IN RE: THE JUDGES OF THE COURT OF APPEAL, SECOND CIRCUIT, APPLYING FOR INSTRUCTIONS.

HAWTHORNE, J.

This proceeding was instituted by the Department of Highways [1] for the expropriation of a tract of land owned by the Ouachita Parish School Board, consisting of an entire square in the City of Monroe with buildings and improvements. The tract sought to be expropriated is being used by the school board in connection with a junior high school with 1200 pupils, and lies in the center of the school facility between the classroom building and

[1] Plaintiff's petition here recites that it is "The petition of the State of Louisiana, Through the Department of Highways, created and organized under the laws of the State of Louisiana, with its domicile in the City of Baton Rouge, Parish of East Baton Rouge, State of Louisiana * * * ". This is evidently because of the provision in R.S. 48:218 that for expropriation of private property the proceedings shall be brought in the name of the state.

the gymnasium. Plaintiff here is proceeding under the authority of Article 6, Section 19.1, of the Louisiana Constitution of 1921 as amended and Title 48 of the Revised Statutes of 1950, Sections 441-460.[2]

On the filing of the petition an *ex parte* order of expropriation was signed by the district judge, and the plaintiff caused to be deposited in the registry of the Fourth Judicial District Court for the use and benefit of the defendant the sum of $171,600.00 alleged to be just compensation for the property ordered expropriated.

The defendant school board timely filed a peremptory exception of no right of action coupled with a motion to dismiss the proceedings and a motion for summary judgment vacating and annulling the order of expropriation. The exception and motions were overruled by the trial judge. After proper notice the defendant school board filed application for supervisory writs in the Court of Appeal, Second Circuit. Pursuant to this application the Court of Appeal in the exercise of its supervisory jurisdiction issued an alternative writ of mandamus directed to the trial judge to show cause why the judgment complained of should not be set aside, the school board's exception and motions sustained, and the order of expropriation vacated and annulled. The Court of Appeal also stayed any further proceedings in the suit, and ordered that the record in the case be forthwith transmitted to that Court.

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[2] Article 6, Section 19.1, of the 1921 Constitution as amended reads: "The Legislature shall have authority to authorize the taking of property for highway purposes by orders rendered *ex parte* in expropriation suits prior to judgment therein provided that provision be made for deposit before such taking with a court officer for the amount of appraisals of the property so taken and damages to which the owner thereof may be entitled, if any, which appraisals may be made in such manner as may be provided by law either before or after institution of suit, and need not be by judicially appointed appraisers." In R.S. 48:441-460 it is provided that in any suit for the expropriation of property the Department of Highways may acquire the property before judgment in the manner prescribed in these sections.

After the record was lodged in the Court of Appeal, that court, availing itself of the provisions of Section 25 of Article 7 of the Constitution, submitted to this court for instructions certain questions of law arising in this suit and transmitted the entire record to us, suggesting that we exercise the power vested by that provision of the Constitution and decide the whole matter in controversy. This we shall do.

The Ouachita Parish School Board in support of its exception and motions contends first that under Article 19, Section 26, of the Louisiana Constitution of 1921, adopted November 6, 1956,[3] the defendant Ouachita Parish School Board is immune from suit or any other legal proceeding without the specific consent and authority of the Legislature.

As far as parish school boards are concerned, this section of the Louisiana Constitution is no longer a bar to suit. This is because Article 3, Section 35, of the

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[3] Article 19, Section 26, reads in part:

"The following named commissions, boards, bodies or municipal corporations are and shall be considered special agencies of the State of Louisiana:

* * * *

"(7) The parish school boards of each of the parishes of the State of Louisiana.

* * * *

"The consent of the State of Louisiana to suits or legal proceedings against any of the above listed special agencies, (however heretofore given) is hereby expressly withdrawn and no such suit or proceeding shall be permitted except as provided in this section. This withdrawal of consent to suits and legal proceedings shall apply not only to suits and legal proceedings filed in the future but also to any pending suits or legal procedure. There is expressly excepted from the foregoing, suits for the enforcement of contracts entered into by any of the special agencies or for the recovery of damages for the breach thereof. Additionally, the Legislature of Louisiana may, in individual cases, by appropriate act grant to any party showing just and reasonable cause the right to sue any of these special agencies, in compliance with Section 35 of Article III of this Constitution.

"This Section shall be self-operative and shall supersede any other portion of this Constitution or any statutes or regulations in conflict herewith."

Louisiana Constitution, adopted November 8, 1960, empowers the Legislature to waive by special or general laws the immunity from suit and from liability of the state and of other public or governmental bodies, and **on that same date the Legislature of this state passed Act 25 of the First Extraordinary Session of 1960, R.S. 17:51, which in Section 1 provides that parish school boards can sue and be sued, thus waiving their immunity from suit.** The instant proceeding was filed by the Department of Highways on December 30, 1960. For a more detailed discussion of this point, see *Terrebonne Parish School Board v. St. Mary Parish School Board and Texaco, Inc.*, handed down this same day, No. 45,797 on the docket of this court.

The next question for determination is whether public property devoted to a public use (as here, to a school) and owned by a public corporation (as in this case, the Ouachita Parish School Board), itself vested with the power of expropriation,[1] is subject to expropriation by The Department of Highways, an agency of the state created by the Legislature by Act 4 of 1942, R.S. 48:11 *et seq.*, which also possesses the power of expropriation.

Expropriation, or eminent domain as it is called in the common law, is the power of the sovereign to take property for public use without the owner's consent. Nichol's Law of Eminent Domain, sec. 1.11, v. 1, p. 2 (3d ed. 1950). This power is inherent in all government, coming into being *eo instante* with the establishment of the government and continuing as long as the government endures, and does not require recognition by constitutional provision for its existence. Ibid., sec. 1.14, pp. 13-14. It is undisputed that the sovereign may delegate the power of expropriation or eminent domain to admin-

[1] See R.S. 19:2(1).

istrative officers or other agencies of the sovereign and to public and private corporations. Ibid., sec. 3.1, pp. 188-189; see R.S. 19:2.

In determining whether property already devoted to a public use can be subjected to expropriation, the factor to be considered is the character of the condemnor. If the sovereign on its own behalf seeks to acquire such property by eminent domain, the fact that the land sought to be taken is public property generally is immaterial. Ibid., sec. 2.2, pp. 131-132; Jahr, Law of Eminent Domain, sec. 20, p. 37 (1953); *Elberton Southern Ry. Co. v. State Highway Dept.*, 211 Ga. 838, 89 S.E. 2d 645; see *Township of Weehawken v. Erie Railroad Company*, 20 N.J. 572, 120 A. 2d 593. If, on the other hand, the sovereign has delegated the power of expropriation to one of its subdivisions or agencies, the rule is that the agency or department cannot expropriate property already devoted to a public use **unless the Legislature has authorized it to acquire public property either expressly or by necessary implication.** Nichols, op. cit. *supra*, sec. 2.2, p. 132; Jahr, op. cit. *supra*, sec. 20, p. 37; *Railway Co. v. Railroad Co.*, 49 La. Ann. 29, 21 So. 144; *Barnegat Light v. Ocean County Freeholders Board*, 44 N.J. Super. 332, 130 A. 2d 409; see *Canzonetti v. City of New Britain*, 147 Conn. 478, 162 A. 2d 695.

Counsel for the school board cites a number of cases for the proposition that an agency or department of the sovereign power cannot expropriate property already devoted to a public use and owned by some other department or agency of the state unless the Legislature has expressly delegated such power to the agency seeking to expropriate. Among these cases are *Davis v. Nichols et al., School Directors*, 39 Ill. App. 610; *Village of Ridgewood v. Borough of Glen Rock*, 188 Atl. 698 (N.J.); *City of*

Edwardsville v. Madison County, 251 Ill. 265, 96 N.E. 238; *Canzonetti v. City of New Britain*, 147 Conn. 478, 162 A. 2d 695. Counsel quotes from *Village of Ridgewood v. Borough of Glenn Rock*, *supra*, thus:

> "The lands are also devoted to a public use, and lands so devoted we think additionally are not subject to condemnation under general powers to that end, but must be specifically by the legislature itself made subject to such proceedings. Lands so held are usually possessed by the corporations, municipal or private, having also general power of condemnation. To subject such lands to taking by one corporation from another under the general powers of condemnation would be to open the door to recriminatory condemnation litigation without end inasmuch as, if under such authority the first taking would be justified, its retaking would be equally within the power of the adverse party. Property once devoted to a public use cannot be diverted therefrom without express authority of the legislature."

Under the general rule given above, the Department of Highways in the instant case cannot expropriate the property of the school board unless the Legislature of this state, either expressly or by necessary implication, has authorized it to acquire public property.

The petition filed by the highway department discloses that it desires to construct in the Parish of Ouachita certain projects, one of which is designated State Project No. 451-06-07, Federal Aid Project No. I-20-3 (12) 115; that this project is a part of the state highway system as well as a part of the national system of interstate and defense highways; that this project will be "a *controlled-access facility*, and no person has any right of access to, from or across such facility to or from abutting

lands except at the designated points at which access is permitted upon the terms and conditions specified from time to time, and upon the service, frontage or access roads provided" (italics ours); that there is included within the right of way for this project the property of Ouachita Parish School Board which the department seeks to expropriate. Moreover, the resolution of the Board of Highways attached to the department's petition specifically states that the project above designated provides for the construction of what is called a controlled-access facility, and the *ex parte* order of expropriation signed by the trial judge clearly shows that the property being expropriated is acquired for a controlled-access facility.

In Title 48 of the Louisiana Revised Statutes of 1950, Chapter I styled "State Department of Highways", Part XIV designated "Control of Access", Section 301 provides that the highway authorities of the state may establish, maintain, and provide controlled-access facilities for public use, etc. Section 303 reads in part:

> "For the purposes of this Part, the highway authorities may acquire private or public property and property rights for controlled-access facilities and service roads, including rights of access, air, view, and light, by donation, purchase, exchange, lease or expropriation in the same manner as they are now or hereafter may be authorized by law to acquire property or property rights in connection with highways and streets within their respective jurisdictions. They may acquire any use of the property or the full ownership of it. * * * "

Thus the Legislature has expressly given the highway department authority to expropriate public property for the purpose for which it here seeks to expropriate the school board's property. Whether the department has

been given authority, either expressly or by necessary implication, to expropriate public property for other purposes need not be decided in this suit.

After the certification by the Court of Appeal to this court of the questions of law here at issue, the Ouachita Parish School Board applied for and was granted a writ of prohibition by the Court of Appeal dated November 22, 1961, prohibiting the Department of Highways of the State of Louisiana, its agents and employees, contractors, and all other parties from entering upon the property involved in this litigation or engaging in any construction work or any physical activity in connection therewith of any kind on the property. The Department of Highways has filed in this court a motion to annul and set aside this writ of prohibition, and for the reasons assigned in this opinion it is ordered that the writ of prohibition be annulled, avoided, recalled, set aside, and declared of no effect.

For the reasons assigned the judgment of the district court overruling the exception of no right of action, the motion to dismiss the proceedings, and the motion for summary judgment vacating and annulling the order of expropriation is affirmed, and the case is remanded to the district court for further proceedings.

APPENDIX 2.

Friday, Dec. 29, 1961

SUPREME COURT OF LOUISIANA

No. 45,797

TERREBONNE PARISH SCHOOL BOARD

versus

ST. MARY PARISH SCHOOL BOARD
and TEXACO, INC.

IN RE ST. MARY PARISH SCHOOL BOARD
APPLYING FOR CERTIORARI, OR WRIT
OF REVIEW, TO THE COURT OF APPEAL,
FIRST CIRCUIT, PARISH OF ST. MARY.

McCALEB, Justice.

This action was brought by the Terrebonne Parish School Board against the St. Mary Parish School Board and Texaco, Inc., to recover proceeds from a mineral lease entered into by the two defendants and, in the alternative, to have the lease cancelled. The lease covered a Sixteenth Section of land located in St. Mary Parish, which was set aside for public school purposes by the federal land grants of 1806 and 1811. The plaintiff's claim to a portion of the revenue therefrom is based upon Article 12, Section 18 of the Louisiana Constitution, as amended by Act 743 of 1954, wherein it is provided:

"* * * The parish school boards of parishes within

> which there lies a township or any portion of a township containing a Sixteenth Section or any portion of a Sixteenth Section shall be entitled to a portion of the proceeds derived from the sale of said Sixteenth Section or any portion thereof, including the sale of timber thereon and revenues arising from mineral leases, contracts, royalties and all other revenues arising from said sales, leases and contracts heretofore made or which may hereafter be consummated and said proceeds and revenues shall be credited to the parish school boards in which such townships are situated in proportion to the percentage of the townships lying in each parish. * * * ".

The plaintiff alleged in its petition that a portion of the township in which the leased Sixteenth Section is situated lies within Terrebonne Parish.

The defendant, St. Mary Parish School Board, filed exceptions to the jurisdiction *ratione materiae* and *ratione personae*. The exceptions were based on an amendment added as a new section to Article 19 of the Constitution in 1956 which withdraws the consent of the State to suits against certain of its agencies and subdivisions. This amendment, which is Article 19, Section 26 of the Constitution, reads in part:

> "The following named commissions, boards, bodies or municipal corporations are and shall be considered special agencies of the State of Louisiana:
>
> " * * * 7. The parish school boards of each of the parishes of the State of Louisiana. * * *
>
> "The consent of the State of Louisiana to suits or legal proceedings against any of the above listed special agencies, however heretofore given, is hereby expressly withdrawn and no such suit or proceeding shall be permitted except as provided in

> this section. * * * There is expressly excepted from the foregoing, suits for the enforcement of contracts entered into by any of the special agencies or for the recovery of damages for the breach thereof. Additionally, the Legislature of Louisiana may, in individual cases, by appropriate act grant to any party showing just and reasonable cause the right to sue any of these special agencies, in compliance with Section 35, of Article III of this Constitution. * * * "

It was St. Mary's contention that it was not amenable to suit under this Section unless permission to sue be first obtained from the Legislature. The exceptions were overruled by the district judge and St. Mary applied to the Court of Appeal, First Circuit, for supervisory writs. The writs were granted and the Court of Appeal found that the district court was correct in overruling the exceptions and the cause was remanded. The Court of Appeal deduced that Section 26 of Article 19 does not envision that the sovereign state itself was to be precluded from instituting suit against one of its agencies; that, in bringing this suit to enforce its constitutional right to a portion of the revenue derived from Sixteenth Section school lands situated in a township within its territorial borders, the plaintiff occupied the position of the sovereign and that, in the absence of an express provision to that effect, Article 19, Section 26 should not be construed as prohibiting suits between state agencies. *See Terrebonne Parish Sch. Bd. vs. St. Mary Parish Sch. Bd.*, 131 So. (2d) 236. From this decision, writs were applied for and were granted by this Court.

We cannot subscribe to the views of the Court of Appeal because Article 19, Section 26 could not be more clear and explicit in its command that the Legislature must first be applied to and permission be granted before

a suit may be entertained against a parish school board. However, we think the exceptions were properly overruled for an entirely different reason, as will be hereinafter shown.

In considering whether the parish school boards are presently immune from suit, a short review of the pertinent legislation on the subject may be helpful. In the statute (Act 100 of 1922, § 17, Par. 1, now R.S. 17:51) providing for the establishment of parish school boards, pursuant to the mandate of Section 10 of Article 12 of the Constitution, these boards are made subject to suits. The statute declared that:

> "There shall be a parish school board for each of the parishes, and these several parish school boards are constituted bodies corporate with the power to sue **and be sued** under the name and style (Name of Parish) Parish School Board * * *". (Emphasis supplied).

Until 1956, there was this general waiver of sovereign immunity with respect to parish school boards. The adoption of Article 19, Section 26 in 1956 had the effect of deleting from R.S. 17:51 the phrase "and be sued". Unfortunately, the parties litigant and the courts below apparently assumed that the law rested at this point and failed to examine constitutional amendments and legislative enactments subsequent to Section 26 of Article 19 in an effort to ascertain whether its provisions, insofar as they pertain to parish school boards, are still effective. As a consequence, we have not had the benefit of argument or briefs concerning posterior laws that very definitely affect the question now before us.

In analyzing the provisions of Section 26 of Article 19 of the Constitution, we particularly note that the withdrawal of the State's consent to sue any of the special

agencies enumerated therein, is subject to two exceptions, (1) in cases seeking enforcement of contracts made by any of the special agencies or for the recovery of damages for the breach thereof, and (2) "in individual cases" whenever the Legislature has granted the right to sue, "in compliance with Section 35 of Article III of this Constitution".

Section 35 of Article 3 of the Constitution, as amended by Act 385 of 1946, provided merely for special legislative authorizations for a suit or suits against the State and its subdivisions in individual cases and did not comprehend a general legislative waiver of immunity which had previously existed under R.S. 17:51 as to parish school boards. However, the Legislature proposed at its regular session of 1960, by Act No. 621 thereof, a complete revision of the provisions of Section 35 of Article 3 of the Constitution[1] which, *inter alia*, would vest the Legislature with more extensive powers respecting the right and authority to waive governmental immunity. This constitutional amendment was adopted by the people on November 8, 1960 and became effective on December 18, 1960. It provides, so far as pertinent here, that the Legislature is empowered to waive " * * * by special or general laws or resolutions, the immunity from suit and from liability of the state, and of parishes, * * * public boards, * * * and other public or governmental bodies; * * * ".

Thus, it is seen that this constitutional amendment effectively extended the legislative power of waiver of immunity from suit against the special agencies (school

[1] This proposed constitutional amendment was occasioned by our 1959 decisions in *Duree vs. Maryland Cas. Co.*, 238 La. 166, 114 So. (2d) 591 and *Stephens vs. Natchitoches Parish School Board*, 238 La. 388, 115 So. (2d) 793, holding that, under the clear language of Section 35 of Act 3, the Legislature could waive only immunity of the State and its agencies from suit but not their immunity from liability.

boards) enumerated in Section 26 of Article 19, which was restricted therein to individual cases, so that thereafter the Legislature was empowered to waive immunity by special or general laws or resolutions. Conformably with the authority vested in it by the 1960 amendment to Section 35 of Article 3, the Legislature, by Section 1 of Act 25 of the First Extraordinary Session of 1960, amended and reenacted R.S. 17:51 providing for the establishment of a parish school board for each of the parishes, constituting the boards as bodies corporate with the power "* * * to sue and be sued under the name and style (Name of Parish) Parish School Board. * * * " Hence, by virtue of this statute, parish school boards have been restored to their original legal status of corporate entities subject to suit which had prevailed since their establishment, save for the short period of time during which Section 26 of Article 19 affected them.

In applying the legislation enacted subsequent to Section 26 of Article 19 and holding that it renders that constitutional amendment ineffective as to parish school boards, we have not overlooked the possibility that counsel for the defendant school board might have been able to present argument in opposition, had plaintiff's counsel cited and relied upon this subsequent legislation in the lower courts and here. In our study of the matter, we have conceived that there are probably two objections which might be advanced with respect to the effectiveness of the 1960 reenaction of R.S. 17:51 to the matter at hand. Therefore, anticipating that these objections will be made in an application for a rehearing (together with any other legal arguments of which we are not aware at this time) we consider it appropriate, under the circumstances of the case, to express views respecting them at this time.

First, we take cognizance of the fact that the major

portion of the acts and resolutions passed by the Legislature in the First Extraordinary Session of 1960 have been declared void as contravening the Federal Constitution by a three judge United States District Court. *Bush vs. Orleans Parish School Board*, 188 F. Supp. 916.[1]

Act 25 is one of the statutes specifically named in the decree in the *Bush* case, above referred to, as being unconstitutional. However, this Act is described in the body of the Court's opinion as being one of the statutes passed in the First Extraordinary Session of 1960 which purported to abolish the Orleans Parish School Board; that, although these local measures are admittedly in the area peculiarly reserved by the Federal Constitution for exclusive State action, they were part and parcel of the "segregation package" introduced at the Special Session of 1960 which had for its purpose the preservation of segregation in the schools, contrary to the U. S. Supreme Court decision in *Brown vs. Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954) and that, therefore they are all unconstitutional.

And, in Appendix "B" attached to and made part of the opinion in the *Bush* case, which summarizes the laws and resolutions enacted by the First Extraordinary Session of 1960 stricken as unconstitutional by the Court, Act 25 is stated to be an Act repealing R. S. 17:121, relating to the election and qualification of the members of the Orleans Parish School Board.

Thus it is manifest that the Federal Court was inter-

[1] This decision was affirmed without opinion on May 8, 1961 by the Supreme Court of the United States. *See New Orleans, Appellant, vs. Earl Benjamin Bush, et al.*, 6 L. Ed. (2d) 270.

[2] The pronouncement that a statute, clear and unambiguous in its terms, is to be stricken with invalidity solely on the basis of motive is contrary, in our opinion, to all previous jurisprudence throughout the land, both State and Federal. For an excellent discussion of the prior jurisprudence see concurring opinion of Janvier, J. in *Lelong vs. Sutherland, et al.* (Ct. App.) So. (2d) , decided on November 7, 1961.

ested only in preserving the law establishing the Orleans Parish School Board, and providing for the election of its members for stated terms, and it struck as unconstitutional the repeal of that law (R.S. 17:121) by Section 2 of Act 25 of the First Extraordinary Session of 1960. Its decree, when viewed in the light of the statements in the opinion and the appendix, can be construed as going no further.[4] Assuredly, it cannot be seriously contended that R.S. 17:51, as **reenacted** * by Section 1 of Act 25 of 1960, is violative of the Federal Constitution or that its provisions are calculated to deprive Negro children of their constitutional rights.

Secondly, it might be argued that, since the amendment to Article 3, Section 35 had not officially become part of the Constitution at the time Act 25 was enacted, the Legislature acted without constitutional authority in waiving the parish school boards' immunity to suit. As aforesaid, the amendment to Article 3, Section 35 was proposed to the voters by Act 621 of the Regular Session of 1960 which was a Joint Resolution of the Legislature. The election of November 8, 1960 was set as the date the amendment was to be voted on. The amendment was approved by the electorate on that date and the Governor proclaimed the results of the election on November 28th. Under Article 21, Section 1 of the Constitution, the amendment did not become part of the Constitution until twenty days had elapsed from the time of the Governor's proclamation. December 18, 1960 was, therefore, the ef-

---

[4] Our action in looking beyond the decree into the body of the opinion to determine the precise effects of the judgment is consistent with the jurisprudence of this Court. *See California Company vs. Price*, 224 La. 238, 99 So. (2d) 743 (1957). By construing the decree in the *Bush* case in keeping with the views expressed in the body of the opinion, a result is reached consonant with the Court's intent. To do otherwise would produce an absurd consequence.

* Note by Counsel: R.S. 17:51 was not reenacted by Act 25; it was **amended**, and reenacted; and, as amended and reenacted, was held unconstitutional.

fective date of the amendment, whereas, Act 25 of the First Extraordinary Session, which was designated as emergency legislation, was signed by the Governor on the evening of November 8th and, purportedly, became effective immediately. At this time, all contingencies were removed from the amendment process and all that remained, before the amendment became part of the Constitution, was for the Governor to make his proclamation and for the requisite amount of time to elapse.

This situation, in which the legislative act pre-dates the formal effectiveness of the constitutional authority for such act, was present in *Etchinson Drilling Co. vs. Flournoy*, 131 La. 442, 59 So. 867. There, it was held that an Act, which was passed at the same time that a constitutional amendment was proposed and made conditional upon the adoption of the amendment, had no validity notwithstanding that the amendment was subsequently adopted.

However, at the time this case was decided (1912), there was no provision of our Constitution which permitted the passage of a law conditioned for its effectiveness upon the adoption of a proposed constitutional amendment. But this was remedied by the Constitution of 1921, as it provided by Section 2 of Article 21 that:

> "Whenever the Legislature shall submit amendments to this Constitution, it may, at the same session, pass laws to carry them into effect, to become operative when the proposed amendments have been ratified.".

Accordingly, it is plain that the ruling in *Etchinson Drilling Co. vs. Flournoy* no longer obtains. Under the 1921 Constitution it has been consistently held that statutes made contingent upon ratification of proposed

amendments to the Constitution are valid. *Peck vs. City of New Orleans*, 199 La. 76, So. (2d) 508; *Peck vs. Tugwell*, 199 La. 125, 5 So. (2d) 524.

Act 25 of 1960 was not passed at the same session as that which the constitutional amendment, on which it depends for its validity, was passed. But, since it was enacted at a later legislative session, we cannot discern that this circumstance makes any material difference. The language of the Constitution authorizing the passage of laws dependent for their validity on constitutional amendments proposed at the same session is permissive. Hence, we know of no reason why legislation may not be enacted at a subsequent session when a constitutional amendment upon which it is dependent for its validity has been proposed at a prior session of the Legislature.

Nor do we find that Section 2 of Article 21 of the Constitution requires, or that it is essential to the ultimate validity of the statute, that it be stated in the Act that its effectiveness is dependent on the ratification of the proposed constitutional amendment. See *G.B. & C.N.-G.R.W. Co. vs. Gross*, 47 Texas, 428 (1877). It suffices, we think, that the Act be passed at the same legislative session or at a session subsequent to that at which the constitutional amendment was proposed. When this is done, it will presumed, as found by the Supreme Court of Texas in the case above cited, that the Act was passed in anticipation of the adoption of the proposed constitutional amendment.

Actually, in the case at bar, it appears that, at the time Act 25 was signed into law (7:15 p.m. on November 8, 1960) the electorate had already adopted the amendment to Section 35 of Article 3 of the Constitution and only the formality of proclamation and the lapse of time stood in the way of its effectiveness. This situation close-

ly parallels that presented in *Druggan vs. Anderson*, 269 U.S. 36, 46 S. Ct. 14, 70 L. Ed. 151, wherein the validity of the National Prohibition Act was challenged on the ground that it was enacted prior to the effective date of the 18th Amendment, although after the ratification of the amendment by the requisite number of states. The Act was, of course, upheld in an opinion by Mr. Justice Holmes.

Being of the view that the Legislature has waived the immunity of parish school boards from suit in the exercise of constitutional authority to do so, the judgment of the Court of Appeal is affirmed.

APPENDIX 3.

November 29, 1961

SUPREME COURT OF LOUISIANA
New Orleans

No. 45,906

FRANCIS R. LeLONG

versus

MATTHEW R. SUTHERLAND ET AL

ON CONSIDERATION OF APPLICATION FOR WRIT OF REVIEW TO THE COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA

PER CURIAM:

Pretermitting the question of the right of this plaintiff to institute and prosecute the instant action, it appears that we are powerless to grant any portion of the relief demanded by him herein inasmuch as the Louisiana statute on which the entire demand is based (Act No. 4 of the Third Extra Session of 1960) has been declared unconstitutional by the United States Supreme Court on the sole ground that assertedly the Legislature was prompted by a discriminatory motive in enacting it. See *Bush et al. v. Orleans Parish School Board et al.*, (U.S. Dist. Ct., E.D. of La.), 188 Fed. Sup. 916 and 194 Fed. Sup. 871, which decisions were approved and affirmed

by the U.S. Supreme Court in causes Nos. 589, 868 and 967 on the docket of such court.

While we entertain serious doubt as to the soundness of that ruling, particularly in view of the uniform jurisprudence of the federal courts (established over a period of many years prior to the consideration of the *Bush* case) to the effect that such tribunals may not and do not inquire into the motives or wisdom of a legislative body acting within its proper power, **the fact remains that the specific statute involved here has been stricken with nullity and rendered permanently ineffective by the highest court of the land. It, in other words, is now non-existent, whether made so rightly or wrongly; and no judicial action can recreate it.**

The writ is refused.

APPENDIX 4

PERTINENT PORTION OF ARTICLE 19, SECTION 26 OF THE CONSTITUTION OF LOUISIANA; AS ADDED BY LOUISIANA ACT NO. 613 OF 1956; ADOPTED NOVEMBER 6, 1956.

"The following named commissions, boards, bodies or municipal corporations are and shall be considered special agencies of the State of Louisiana:

" * * * (7) The parish school boards of each of the parishes of the State of Louisiana * * *

"The consent of the State of Louisiana to suits or legal proceedings against any of the above listed special agencies, (however heretofore given), is hereby expressly withdrawn and no such suit or proceeding shall be permitted except as provided in this section. * * * There is expressly excepted from the foregoing, suits for the enforcement of contracts entered into by any of the special agencies or for the recovery of damages for the breach thereof. Additionally, the Legislature of Louisiana may, in individual cases, by appropriate act grant to any party showing just and reasonable cause the right to sue any of these special agencies, in compliance with Section 35, of Article III of this Constitution.

"This Section shall be self-operative and shall supersede any other portion of this Constitution or any statutes or regulations in conflict herewith."

APPENDIX 5.

LOUISIANA ACT NO. 25 OF THE FIRST EXTRAORDINARY SESSION OF 1960.

(The text of this Act is taken from the official publication of the acts of the Legislature by the Secretary of State. It will not be found in Title 17, Louisiana Revised Statutes because it was held unconstitutional by the United States Supreme Court.)

"Be it enacted by the Legislature of Louisiana:

"Section 1. That Section 51 of Title 17 of the 1950 Louisiana Revised Statutes, relative to Parish School Boards, be amended and re-enacted so as to read as follows:

"Section 51. Parish boards as bodies corporate; officers upon whom service may be made.

"There shall be a parish school board for each of the parishes, and the Legislature shall make provision for the creation and election of a School Board for the Parish of Orleans, and these several parish school boards are constituted bodies corporate with the power to sue and be sued under the name and style (Name of Parish) Parish School Board. Citation shall be served on the president of the board and in his absence on the vice-president.

"Section 2. That Section 121 of Title 17 of the 1950 Louisiana Revised Statutes relative to the nomination and election of members of the Orleans Parish School Board, qualifications, compensation, and vacancies, be and the same is hereby repealed in its entirety.

"Section 3. The necessity for the immediate passage of this Act having been certified by the Governor to the

Legislature while in session, in accordance with Section 27 of Article III of the Constitution of Louisiana, this Act shall become effective immediately upon approval by the Governor.

"Approved by the Governor: November 8, 1960, at 7:15 P. M."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 845

OUACHITA PARISH SCHOOL BOARD,

Petitioner,

vs.

STATE OF LOUISIANA, THROUGH THE DEPARTMENT OF HIGHWAYS,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Louisiana.

ORIGINAL BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI

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IN THE

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Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Louisiana.

ORIGINAL BRIEF ON BEHALF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

May It Please the Court:

I.

QUESTION PRESENTED FOR REVIEW.

The Supremacy Clause of the Constitution of the United States is not properly the basis of the question

tendered for review by the application of petitioner for writ of certiorari. The decision of the Supreme Court of Louisiana rendered December 29, 1961, was predicated solely and entirely on the pertinent and applicable portions of the Constitution and statutes of the State of Louisiana and the decision was rendered on and supported by wholly nonfederal grounds, no federal question or issue in the instant case having been presented to the Supreme Court of Louisiana and no such federal question was necessary to the determination of the case, as is shown affirmatively by the opinion of the Supreme Court of Louisiana in the case of *Terrebonne Parish School Board v. St. Mary Parish School Board, et al.* (1962), 138 So. (2d) 104 (R-168), which appears in the petition as appendix 2, referred to in the decision of the instant case (R-19), which also appears in the petition as appendix 1, all in accordance with the well-recognized and established jurisprudence of the inferior federal courts and this Court. *Southwestern Bell Telephone Co. v. State of Oklahoma* (1928), 58 S. Ct. 528, 303 U.S. 206, 82 L. Ed. 751; *Williams v. Kaiser* (1945), 65 S. Ct. 363, 323 U.S. 471, 89 L. Ed. 398; *Geo. O. Richardson Machinery Co. v. Scott* (1928), 48 S. Ct. 264, 276 U.S. 128, 72 L. Ed. 497; *Musser v. State of Utah* (1948), 68 S. Ct. 397, 333 U.S. 95, 92 L. Ed. 562; *Dudley v. Mayo* (1956), 76 S. Ct. 806, 351 U.S. 277, 100 L. Ed. 1178; *Young v. Rayen* (1949), 69 S. Ct. 1073, 337 U.S. 235, 93 L. Ed. 1333; and *Spector v. Randall* (1958), 78 S. Ct. 1332, 357 U.S. 513, 2 L. Ed. (2d) 1460, as well as many other positive and unequivocal an-

thorities in support of this principle. This issue is the sole question presented, as shown by the petition for writ at page 5, No. III.

The Supreme Court of Louisiana **did not hold**, that it (the Supreme Court of Louisiana) was not bound to accept the adjudication of unconstitutionality of a statute because the Federal Court decision was **motivated** by considerations of racial segregation, as the petition for writ asserts (pp. 5, 7). No such holding was made and such a holding cannot reasonably be inferred from the language of the decision of the Supreme Court of Louisiana. The Court merely discussed the *Bush* case and others **after a decision had been reached** on the basis of the Constitution and statutes of Louisiana and wholly without the consideration of any federal question, pretermitting that no federal issue had been presented in the submission of this case to the Supreme Court of Louisiana.

II.

ARGUMENT FOR DENIAL OF WRIT.

At the outset, it is appropriate to assert that the decision sought to be reviewed does not represent any form of interposition, judicial or otherwise, and in no way involves the question of segregation.

The decision of the Supreme Court of Louisiana is grounded wholly and completely on the application and in-

terpretation of the Constitution and statutes of Louisiana. No issue of a federal question of substance or of repugnancy of the Louisiana statute under consideration to the Constitution of the United States was before the Louisiana Court. The grounds of decision were wholly adequate under State law and required no reference to federal law or jurisprudence. Any reference thereto was incidental and the physical format of the decision sought to be reviewed supports the thesis that the judgment had been reached on an adequate and nonfederal basis prior to any discussion by the Supreme Court of federal decisions, particularly the *Bush* case, but this discussion in nowise formed the groundwork for the decision; in fact, this discussion might well be placed in the category of *obiter dicta*.

The legal position of respondent, as set forth herein, is predicated on a solid bulwark of federal decisions and jurisprudence, typical of which are many decisions of this Court.

The case of *Gee, O. Richardson Mach'y Co. v. Scott*, 1928, 48 S. Ct. 264, 276 U.S. 128, 72 L. Ed. 497, is authority for the proposition that where a decision of a state court rests on adequate nonfederal ground, writ of certiorari issued by United States Supreme Court may be dismissed, notwithstanding unnecessary discussion by state court of constitutional question. This Court said:

> "A the decision of that court was rested, and may rest, on this rule, an adequate nonfederal ground

the writ must be dismissed. Billy v. Stewart, 246 U.S. 253, 257, 38 S. Ct. 261, 62 L. Ed. 701; Doyle v. Atwell, 261 U.S. 590, 591, 43 S. Ct. 440, 67 L. Ed. 811."

To the same effect is the case of *Hoeffgate v. Hawks* (1937), 57 S. Ct. 350, 300 U.S. 14, 81 L. Ed. 476:

"Before we may undertake to review a decision of the court of a State it must appear affirmatively from the record, not only that the federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause."

Another solid and typical case is that of *Southwestern Bell Telephone Co. v. State of Oklahoma, et al.* (1938), 58 S. Ct. 528, 303 U.S. 206, 82 L. Ed. 751, in which the decisive language is:

"We have repeatedly held that it is essential to the jurisdiction of this Court in reviewing a decision of a court of a State that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the State having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause; that the federal question was actually decided or that the judgment as rendered could not have been given without deciding it."

The same rule is applicable in criminal cases, as attested by the language of this Court in the case of

Williams v. Kaiser (1945), 65 S. Ct. 363, 323 U.S. 471, 89 L. Ed. 398:

> "... It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause."

Another case is that of *Musser, et al., v. State of Utah* (1948), 68 S. Ct. 397, 333 U.S. 95, 92 L. Ed. 562, which contains the following:

> "... What the statutes of a State mean, the extent to which any provision may be limited by other Acts or by other parts of the same Act, are questions on which the highest court of the State has the final word. The right to speak this word is one which State courts should jealously maintain and which we should scrupulously observe." ...

The legal principle exemplified by the foregoing cases has been enunciated and followed by the inferior federal courts. To this effect is the case of *United States, ex rel. Hoeye, v. Commonwealth of Pennsylvania* (1950), 89 F. Supp. 636:

> "It is a well-established principle that before the Supreme Court will review a decision of a state court, it must affirmatively appear from the record

> that the federal question was presented to the highest court of the state having jurisdiction, and that its decision of the federal question was necessary to its determination of the cause." * * *

A similar case is that of *United States, ex'rel. Pascal, v. Banks* (1950), 90 F. Supp. 868.

III.

FINALITY OF JUDGMENT.

It is essential that the finality of the judgment of the state Court be present for the purposes of remedy by certiorari. It is submitted that such finality is not presented in the application for writ, since the judgment rendered is of an interlocutory nature, being a decision on the intermediate or interlocutory pleadings of exception of no right of action, motion to dismiss and motion for summary judgment. This judgment (Appendix I, page 17, of the petition) concludes with this verbiage:

> "For the reasons assigned the judgment of the district court overruling the exception of no right of action, the motion to dismiss the proceedings, and the motion for summary judgment vacating and annulling the order of expropriation is affirmed, and **the case is remanded to the district court for further proceedings.**" (Emphasis added.)

This view as to finality of judgment is supported by the jurisprudence. The case of *Brown, et al., v. Tobin* (1917), 38 S. Ct. 7, 245 U. S. 18, 62 L. Ed. 123, clarifies this concept as follows:

> "The act in question, although it deprived of the right of review by writ of error which had

hitherto obtained in certain cases and substituted as to such cases the right of petitioning for review by certiorari subjected this last right to the same limitation as to the finality of the judgment of the state court sought to be reviewed which had prevailed from the beginning under section 709, Rev. Stat. (section 237, Judicial Code [Comp. St. 1916, § 1214]. **Finality, therefore, continues to be an essential for the purposes of the remedy by certiorari conferred by the act of 1916.**" (Emphasis added.)

Further support is furnished in the determination of the case of *Urie v. Thompson* (1949), 69 S. Ct. 1018, 337 U. S. 163, 93 L. Ed. 1282, in which the categorical essentiality of finality is pronounced:

"From the opinions of the state supreme court we know judicially that its judgment negating the general claim for negligence was coupled with its subsequently repudiated conclusion that petitioner had stated a cause of action under the Boiler Inspection Act and that, consequently, the court remanded the cause for trial, not for dismissal. **The judgment therefore was not final; it was interlocutory and not reviewable here within the meaning of our jurisdictional statute.** 28 U. S. C. § 344(b) [now § 1257(3)], 28 U. S. C. A. § 1257(3)." (Emphasis added.)

CONCLUSION.

For the reasons set forth hereinabove, it is submitted that the petition for writ of certiorari to review

the judgment of the Supreme Court of Louisiana, dated December 29, 1961, should be denied.

Respectfully submitted,

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By: GLENN S. DARSEY,

By: NORMAN L. SISSON,

May 17, 1962.

CERTIFICATE OF SERVICE.

I hereby certify that a copy of the foregoing brief has been served on the petitioner, Ouachita Parish School Board, in accordance with Rule 33 of the Revised Rules of the United States Supreme Court, through counsel of record, George M. Snellings, Jr., Esq., by depositing same in a United States Post Office, first-class postage prepaid, addressed to counsel of record at 603 Bernhardt Building, Post-Office Box 1663, in Monroe, Louisiana, and that I am a member of the Bar of the United States Supreme Court.

Baton Rouge, Louisiana, May 28, 1962.

Norman L. Sisson

NORMAN L. SISSON